86-1441

No.

IN THE

SUPREME COURT OF THE UNITED STATES

LEONARD SOLTIES AND CECILIA SOLTIES, h/w
Petitioners,

v.

MASSEY-FERGUSON, INC.,
Respondent,

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

On Appeal From the Final Order Denying Reargument Entered by the United States Court of Appeals for the Third Circuit at No. 86-3092 Entered November 19, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Is a plaintiff in a civil action denied procedural due process when his unopposed request for a brief continuance because of family illness is denied and he is compelled to go to trial with substituted counsel?

2. May a federal court sitting in diversity ignore controlling state law as that law has been declared by the highest court of that state?

3. Is a plaintiff in a civil action denied procedural due process when the trial court arbitrarily and erroneously excludes critical rebuttal testimony contrary to the Federal Rules of Civil Procedure and established precedent?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs below: Leonard and Cecilia Solties, husband and wife.

Defendants below: Massey-Ferguson, Inc., and International Harvester Co.

International Harvester Co. was dismissed as a party defendant before trial by agreement of the parties. It did not participate in the trial or appellate proceedings below.

Massey-Ferguson, Ltd., is the parent company of Massey-Ferguson, Inc. The shares of Massey-Ferguson, Inc., are held by Massey-Ferguson (Delaware), Inc., which shares are owned by Massey-Ferguson, Ltd., a Canadian corporation.

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REPORTS OF OPINIONS IN THE COURTS BELOW

The United States District Court for the Western District of Pennsylvania did not issue an opinion. The opinion of the panel of the Third Circuit Court of Appeals is unpublished. The opinion of the Third Circuit Court of Appeals is attached hereto as part of the appendix pursuant to Supreme Court Rule 21.1(k)(i).

THE BASIS FOR THIS COURT'S JURISDICTION

The judgment of the Third Circuit Court of Appeals to be reviewed was entered on October 23, 1986. A Petition for Rehearing was timely filed on November 6, 1986. The Petition for Rehearing was denied by the Third Circuit Court of Appeals by Order dated November 19, 1986. The judgment of October 23, 1986, and the Order of November 19, 1986, are attached hereto in the appendix pursuant to Supreme Court Rule 21.1(k)(i).

This Court may exercise jurisdiction over this case pursuant to 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the Eastern District of Pennsylvania on July 6, 1983, and subsequently transferred to the United States District Court for the Western District of Pennsylvania. It was commenced as a diversity jurisdiction/product liability/negligence case and sought damages for injuries suffered by Leonard and Cecilia Solties arising out of an accident on November 2, 1982, when Leonard Solties became entangled in a corn picker designed and manufactured by Massey-Ferguson. As a result of that accident, Leonard Solties lost his right leg below the knee and suffered

severe, disabling and disfiguring injuries to his dominant right hand. The theory of liability under which the case was tried was that the corn picker was defective because of a lack of guarding over the parts in which Mr. Solties became entangled and the absence of any means for him to turn off the machine once he was caught in it. The principal defense theory was that Leonard Solties had deliberately reached in to the moving parts of the machine in order to remove an alleged obstruction.

The bifurcated case was tried before Senior Judge Joseph Willson and a jury from January 13, 1986, until January 16, 1986. The jury returned a verdict for Massey-Ferguson. There were no special interrogatories shedding light on the bases of the verdict. A timely appeal to the Circuit Court of Appeals for the Third Circuit was filed on January 31, 1986. By opinion and order dated October 23, 1986, the Third Circuit affirmed. A timely petition for reargument was filed on November 6, 1986, which was denied by order dated November 19, 1986. This Petition for Certiorari was timely filed thereafter.

This Petition raises three issues. The first is the constitutionality and propriety of the District Court's refusal to grant an unopposed, short continuance based upon the unavailability of plaintiffs' trial counsel necessitated by family illness. The second is the trial court's *gross* deviation in its charge from the dictates of the controlling law of the Commonwealth of Pennsylvania, as declared by the Pennsylvania Supreme Court, which deviation constituted a repudiation of the *Erie* doctrine and was so great a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The third concerns the trial court's erroneous refusal to allow crucial witnesses to testify, thereby depriving plaintiffs of an opportunity to present their case and rising to the level of a violation of procedural due process.

The corn picker was made by Massey-Ferguson in the early-mid-1950's when Massey was doing business as Massey-Harris, Inc., (R. 192a, 232a-233a).[1] It was an implement that picked and

1. Citations to the record refer to the reproduced record filed with the Third Circuit.

husked corn by means of a series of mechanical processes. (R.223a-24a).

Power to the corn picker was supplied by a tractor which pulled and drove the corn picker by what is known as a "power take off," ("PTO") at the tractor's rear. (R.133a). The corn picker had no source of power of its own. (R.223a). The PTO is a driveshaft type of arrangement which transmits power to the corn picker by rotation. (R.133a). The means of turning the PTO on and off was a lever located behind the tractor's seat. (R.151a). There was no other means of turning the PTO on and off. A farmer entangled in the corn picker could not reach this lever. (R.113a-14a).

The corn picker was designed to harvest one row of corn at a time. At its front was a single "V"-shaped snout at the opening of which was a series of gathering chains and snapping rolls. (Drawings of the corn picker from the operator's manual are included in the Third Circuit appendix at 354a, 359a and 374a. Copies are included in the appendix filed herewith.) The gathering chains, one on each side of the opening, pulled the corn stalks in to the snout and kept them moving toward the rear of the snout. The snapping rolls, located beneath the gathering chains, consisted of two circular rolls with raised spiral fluting running their entire length. These rolls were designed to grab the corn stalks and pull them downward at a speed of approximately seven feet per second. (R.133a). The rolls rotated toward each other at high speed creating an "in-running nip point." (R.266a). The space between the rolls was adjustable but invariably set at a distance smaller than the diameter of an ear of corn. (R.138a, 137a). This high speed downward motion of the stalks through this narrow in-running nip point "snapped" the ears of corn off the corn stalks. (R.133a-143a). The ears were then further processed in other parts of the machine until a husked ear was dropped by an elevator in to a wagon trailing the tractor and picker. (R.134a, 137a). There was no guard or shielding of any sort over the area in which the gathering chains and snapping rolls operated. An operator caught in these rolls and/or chains would be unable to turn the corn picker off.

On November 2, 1982, Leonard Solties, according to his testimony, fell while walking around the operating machine in an effort to aurally locate the source of a suspicious noise. Two prior efforts to locate the source of the noise while the machine was turned off had been unsuccessful. (R.130a, 139a, 140a-42a, 166a, 169a, 175a). His right hand came in to contact with the inside surface of the snout and slid down in to the totally unguarded snapping rolls. (R.174a). The dorsal surface of his hand became engaged in the snapping rolls and could not be extricated. (R.175a-76a). The machine could not be turned off. In his frantic struggles to escape the machine, Mr. Solties's right leg also became caught. (R.143a).

This case was instituted under the law of strict of liability as adopted and declared by the Pennsylvania Supreme Court in cases such as *Azzarello v. Black Brothers Co.*, 480 Pa. 547, 391 A.2d 1020 (1978) and *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974). A claim for negligence was also pleaded.

The defects alleged to support the product liability claim were the total absence of guarding over the exposed chains and rolls and the absence of any means of turning off the machine that could be operated by a farmer trapped in the snout area. (R.111a-12a). Plaintiffs' expert advocated at trial the use of "stripper plates", flat metal plates, above the snapping rolls to narrow the width of the opening, (R.228a-30a), and a cable-activated shut-off device reachable by a trapped operator. (R.32a-36a, 234a-37a, 242a). A claim for punitive damages, on which the trial court refused to permit evidence (R.119a), was premised upon proof that Massey marketed a defective corn picker despite its knowledge of an extraordinary number of accidents involving its corn pickers and pickers substantially similar to its own, and its participation in industry association committees and meetings at which the dangers of these machines were acknowledged and discussed, but never cured. The evidence would have shown such knowledge as early as the 1930's. Evidence would have been presented on the availability of cut-off technology dating back to the turn of the century. (R.32a-36a).

Massey's main defense at trial was its contention that Leonard Solties had deliberately reached in to the machine to remove a clog. (Tr. 28-9, 432, 434). It argued that its theory was supported by a statement allegedly made by Leonard Solties to his brother Anthony within a day or two of the accident while he was in intensive care. (R.299a, 302a). Massey also premised its theory upon arguments that the corn picker was badly worn despite testimony by another farmer that the machine had served him well during that same harvest season. Finally, Massey argued that the safety devices advocated by plaintiffs were unworkable even though no evidence of any tests, studies, or experience with such devices was offered.

Three business days before trial plaintiffs moved on the record, without opposition, for a short continuance based upon the serious illness of plaintiffs' trial counsel's wife. (R.105a, 106a-08a, 115a-17a). Judge Willson denied this request, characterizing the situation of a serious illness as "nothing", (R.107a), and insisting, *incorrectly*, that designated trial counsel had failed to appear at pretrial conferences. (R.88a, 100a, 106a). This denial forced a last minute substitution of trial counsel — a point for some unknown reason highlighted by Judge Willson at the very opening of the trial and frequently, and unnecessarily, emphasized by him throughout the trial in the presence of the jury. (R.118a, 158a, 177a, 202a, 203a, 190a-91a, 303a).

Plaintiffs were precluded at trial from referencing their claim for punitive damages. (R.119a-193a-94a). This ruling was based upon an alleged failure to raise the claim in plaintiffs' pretrial narrative or in pretrial conferences — notwithstanding a clear reference to it in the complaint, the narrative and at an August 27, 1985, pretrial conference. (*E.g.* R.26a). Judge Willson also based his ruling on an alleged absence of relevant discovery, although how that would justify precluding a claim was never explained, and notwithstanding a substantial list of relevant exhibits in the pretrial narrative. (R.28a-30a). (*Compare* R.10a-11a and 25a *with* 220a-22a; Tr. of 8/27/85, pp. 30-31.).

Judge Willson refused to permit plaintiffs' expert to diagram the corn picker for the jury in order to assist the jury's understanding of the machine and the safety devices he advocated.

Judge Willson ruled that to be admissible, evidence must be "heard". (R.224a).

Judge Willson refused to permit plaintiffs' expert to testify regarding the history of corn pickers on the issue of knowledge of their dangers and frequency of injuries caused by them. (R.193-97a). He unilaterally refused, for no discernible reason, to permit plaintiffs to present a case based upon negligence theories which had been pleaded in the complaint. (R.101a-02a). He refused to permit plaintiffs' expert to testify that the age and condition of the machine were irrelevant to the circumstances of this accident even though Massey was arguing to the contrary. (R.239a). The purported basis for this ruling was his *sua sponte* substitution of a brief letter written by plaintiffs' expert to plaintiffs' counsel for the extensive discovery materials supplied by plaintiffs to the defendant and the court regarding the expert's testimony, and his requirement that the expert's testimony be confined to the scope of the letter even though it was never submitted or intended as a report or expert witness interrogatory answers. (R.32a-87a, 205a-22a). The extensive material supplied by plaintiffs in discovery, including interrogatory answers, papers authored by the expert, test results, etc., had been provided to Massey and the court and were apparently satisfactory to Massey because it withdrew a request for the expert's deposition after receiving them. (Proceedings of 8/27/85, pp. 16-17).

Judge Willson refused to charge the jury on the settled Pennsylvania concept of substantial factor in his instructions on causation, as requested by *both* parties. Instead, using lay dictionary definitions, he charged the jury that the alleged defects had to be *the* cause of the accident. No basis was given for this charge which represented a marked departure from Pennsylvania law. (R.312a, 339a).

Judge Willson charged the jury on contributory negligence notwithstanding that there is no such defense to a strict liability claim under Pennsylvania law, (R.229-41a), and he had ruled for unknown reasons that plaintiffs would not be permitted to present a negligence case. (R.101a-02a).

Judge Willson refused at trial to permit plaintiffs to use as rebuttal the deposition of Frances Solties, another of Leonard's

brothers, which would have contradicted the testimony of Anthony regarding Leonard's alleged conversation in intensive care. Judge Willson based his ruling solely on the erroneous conclusion that since Frances resided in the Western District of Pennsylvania he could be subpoenaed and, therefore, his deposition could not be used. Judge Willson adhered to this mistaken view even after it was pointed out to him that the witness resided more than one hundred miles from the court house. (R.306a-09a, 395a).

Judge Willson, finally, refused to permit Leonard's treating physician, Dr. John Lubahn, to testify on rebuttal that Leonard's injuries were inconsistent with the manner in which Massey claimed the accident happened. (R.462a-65a). The doctor would have testified that because *all* of the damage to Leonard's hand was to the dorsal surface, and did not involve the palm or knuckles beyond the first joints, it was improbable that Leonard was reaching into the machine since under such circumstances the typical injury involves the entire hand being drawn in to the machine with circumferential injuries, i.e., to all sides of the hand over three hundred and sixty degrees. (R.465a). Judge Willson ruled that this was not proper rebuttal even though it went exclusively to refuting Massey's version of how the accident did happen.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. THE TRIAL COURT'S DENIAL OF PLAINTIFFS' UNOPPOSED REQUEST FOR A SHORT CONTINUANCE BASED UPON THE SERIOUS ILLNESS OF PLAINTIFFS' TRIAL COUNSEL'S WIFE DEPRIVED PLAINTIFFS OF DUE PROCESS.

The week before trial plaintiffs moved for a continuance because of the serious illness of the wife of plaintiffs' trial counsel, Richard M. Rosenbleeth. The request was unopposed. There is nothing of record to suggest, and no suggestion has ever been made, that the request was motivated by anything other than the utmost good faith, without any desire to delay the trial for more

than a brief period. The trial court denied the request for no apparent reason other than its completely *mistaken* belief that Mr. Rosenbleeth had never appeared before the court and had not signed documents filed with the court. (R.106a). For many months prior to trial Mr. Rosenbleeth's name had appeared on every paper filed with the court. (R.37a, pretrial narrative). He had appeared before the court to identify himself as trial counsel. (R.100a).

While the grant or denial of a continuance is ordinarily entrusted to the sound discretion of the trial court, it has been held that that discretion can be abused when the trial court's zeal to dispose of litigation prejudicially deprives litigants of substantive rights. *Sutherland Paper Co. v. Paper Box Co.*, 183 F.2d 926 (3d Cir.), *cert. denied*, 340 U.S. 906 (1950); *Latham v. Crofters, Inc.*, 492 F.2d 913 (4th Cir. 1974). That discretion must *always* be exercised in the interest of justice. *Cornwell v. Cornwell*, 118 F.2d 396 (D.C. Cir. 1941). This Court has held:

> "The term 'discretion' denotes the absence of a hard and fast rule, . . . When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances of the law, as directed by the reason and conscience of the judge to a just result."

Lagnes v. Green, 282 U.S. 531, 541 (1931). *See*, *Gaspar v. Kassm*, 493 F.2d 964 (3d Cir. 1974) (Denial of a continuance based upon illness of a party reversed; consideration given to length of delay, absence of prior delay, absence of prior requests for continuance, diligence in making the request, lack of evidence request was not made in good faith, absence of prejudice to the opposing party and absence of opposition to the request.).

Here, the request was unopposed. There was no delay by plaintiffs. There had been one prior continuance resulting from the case not being reached on the trial list. Another continuance was by agreement of all of the parties. A third continuance resulted from *Massey's* error, unquestionably made in good faith, in failing to identify certain witnesses. There was no question

here that the request was not being made in good faith and there was no delay in bringing the request before the trial court. Nor was there any indication by the lower courts that they viewed the request as being to the slightest degree indicative of bad planning or procrastination. Simply put, there was no logical reason to deny the request. Under these circumstances, continuances are rarely, if ever, denied. *See, e.g., Smith-Weik Machinery Corp. v. McCormack Machine and Engineering Co.*, 423 F.2d 842 (5th Cir. 1970); *David v. Operation Amigo, Inc.*, 378 F.2d 101, 103 (10th Cir. 1967).

As a result of the trial court's refusal of the continuance, a last minute substitution for plaintiffs' chosen counsel was necessitated. (R.118a). The magnitude of this case required experienced counsel and no other attorney familiar with the case could lay claim to such experience. (R.107a). The Solties had sought out and retained experienced trial counsel and were entitled to that benefit at trial. *See United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970) (habeas corpus proceedings). (Due process requires an opportunity to retain counsel of choice and bars arbitrary action prohibiting effective use of that counsel.).

Minimal due process requires an opportunity for litigants to have their case heard at a reasonable time and *in a meaningful manner*. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Under appropriate circumstances a denial of a continuance may rise to the level of a violation of due process. *Grigsby v. Mabry*, 637 F.2d 525, 527 (8th Cir. 1980) (habeus corpus proceedings). Where without reason a party is deprived of counsel, even in a civil case, due process *must* be of concern. The meaningfulness of the right to be heard is lost, if that right is conferred at the same time the litigant is deprived of counsel for reasons beyond counsel's or the litigant's control. If, as has been said, *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978), the test to be applied in such cases is a weighing of the competing interests of the parties and the court, in this case that balance was overwhelmingly tipped in plaintiffs' favor. Their request was unopposed and was for but a brief period. The only "interest" advanced by the trial

court's rush to trial in the face of these circumstances was, admittedly, its own by way of a case disposition. (R.115a-16a). This is not sufficient basis for depriving plaintiffs of their chosen counsel, and by so doing deprive them of due process.

II. THE HOLDINGS OF THE COURTS BELOW ARE SO GREAT A DEPARTURE FROM PENNSYLVANIA LAW AS TO AMOUNT TO A REPUDIATION OF THE ERIE DOCTRINE:

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), established the well-settled principles governing the law that will control federal cases brought under diversity jurisdiction:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), Justice Frankfurter explained *Erie* as follows:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *[Erie]* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in State court a block away, should not lead to a substantially different result." 326 U.S. at 109.

See also, Byrd v. Blue Ridge Royal Electric Corp., 356 U.S. 525 (1958).

The application of the *Erie* doctrine arises in this case because of two portions of the trial court's charge to the jury. First, the trial court refused a charge requested by *both* parties that the jury be instructed that plaintiffs carried their burden of proof on causation if they convinced the jury that the defects alleged were a "substantial factor" in causing the injuries. Second, the trial court told the jury that Leonard Solties had departed in his conduct from that which the "ordinary user" of the corn picker would have done, that he knew there was a danger but proceeded nevertheless to confront it, and that he was injured while "playing" with the corn picker. Nowhere in the court's charged was there an instruction that under Pennsylvania law contributory negligence was not a defense. Pennsylvania's comparative negligence statute was not alluded to. The requirements for a defense of assumption of the risk in a product liability case were never mentioned.

The law of Pennsylvania, which the courts below were *bound* to follow, is that a plaintiff has proven causation if the alleged defect is found by the jury to have been a "substantial factor" in causing the injuries complained of. *Ford v. Jeffries*, 474 Pa. 588, 379 A.2d 111 (1977); *Flickinger Estate v. Ritsky*, 452 Pa. 69, 305 A.2d 40 (1973). So uniformly accepted is this concept by the courts of Pennsylvania that a charge on "substantial factor" has been included in the Pennsylvania Suggested Standard Civil Jury Instructions.[2]

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2. "In order for the plaintiff to recover in this case, the defendant's . . . conduct must have been a substantial factor in bringing about the accident. That is what the law recognizes as legal cause. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident." 3.25.

"Where the negligent conduct of a defendant combines with other circumstances and other forces to cause the harm suffered by the plaintiff, the defendant is responsible for the harm if his negligent conduct was a substantial contributive factor in bringing about harm, even if the harm would have occurred without it." 3.27

The trial court nevertheless *refused* this charge without explanation. In its stead, it defined cause according to lay dictionaries and repeatedly emphasized that for plaintiffs to prevail they had to prove that the defect was *the* cause of the injuries. (R.312a, 339a). This departure from Pennsylvania law, *as to which the parties were in agreement*, amounted to a repudiation of the *Erie* doctrine. The Third Circuit affirmed by searching the record for an isolated, supposedly correct, instruction and found no error. Overlooked by the majority were numerous contradictory statements in the charge. See Mansmann, J., dissenting.

Elsewhere in the charge, the trial court instructed the jury as follows:

> "I don't decide the facts, you do, but I want to point this out to you. Is Mr. Solties [sic] testimony and his deposition and what he said here, are you satisfied that he told you what he remembered, his memory of what happened, the man was hurt, blood all over him. He told his wife. She says he didn't know, various stories have been told here now. Does she know? Do we know today? What caused — whether that any defect, if [sic] was one or two of those defects, did they play any part in it or whether he walked around and fell down inspite of everything, and did he get hurt on account of falling into the machine, and he left a free running machine.
>
> "This man is a mechanic, he's run garages, he's made his living at it for years and he walked away twice. He didn't — he turned it off, he knew it was a danger to walk around there and play with that machine while it was running. The third time he thought, well, I can't find it, maybe I'll turn it on, but he got into trouble.
>
> "Now, was that trouble he got into caused by one of the two or three things they claim here? The guard, the cable that would shut it off. There was shut off devices, you know, not only, on the switch, on the wires that the witnesses talked about, but there was a lever there that shut off the P.T.O. . . . turn the lever and it was disconnected — that's what ordinary users of it would do . . . ." (R.340a-41a).

These factually inaccurate, (No witness testified that there was a cut-off switch on any wires and Leonard Solties most certainly was not "playing" with the corn picker.), prejudicial comments injected contributory negligence into the case in a way grossly prejudicial to the plaintiffs and *totally contrary to Pennsylvania law*. The Third Circuit found no error in this charge by reasoning that a comment that the plaintiff was negligent is harmless if the jury is not also told that such negligence is a defense. The dissent, however, correctly pointed out that the harm arises from the failure to instruct the jury that the negligence is *not* a defense. The majority, ignoring the plain error rule, also reasoned, in the alternative, that the objection was not preserved, without addressing the dissenting judge's conclusion that the objection made was, under the circumstances, sufficient to alert the trial judge to the claim of error.

Under Pennsylvania law contributory negligence has *never* been a defense to a product liability action and it has been held repeatedly and without deviation, until now, that *the plaintiffs' alleged negligence is utterly and totally irrelevant*. *E.g.*, *Hammond v. International Harvester Co.*, 691 F.2d 646 (3d Cir. 1982); *Holloway v. J. B. Systems, Ltd.*, 609 F.2d 1069 (3d Cir. 1979); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Furthermore, while assumption of a risk is a defense under Pennsylvania law to a product liability action, its elements were never defined for the jury, i.e., that the defendant must prove a subjective knowledge and appreciation of the nature, character and extent of the danger and a voluntary decision to confront it. *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223, A.2d 746 (1966).

The upshot of these errors was that plaintiffs were forced to satisfy a novel burden of proof, in flat contradiction of the *undisputed* law of Pennsylvania, and the jury was told that Leonard Solties had been careless without also being told that the carelessness was absolutely irrelevant. In each instance the charge to the jury was *directly and completely contrary to Pennsylvania law* to such a degree that Pennsylvania law was effectively repudiated and, with it, the *Erie* Doctrine.

III. THE TRIAL COURT'S ERRONEOUS REFUSAL TO PERMIT PLAINTIFFS TO CALL TWO CRITICAL REBUTTAL WITNESSES DENIED PLAINTIFFS DUE PROCESS.

Plaintiffs sought to call two rebuttal witnesses. The first was Francis Solties, whose testimony, by deposition, would have been that at the time Leonard was supposedly making an adverse statement to Anthony Solties about how the accident happened, Leonard was, in fact, permitted absolutely no visitors. The second witness was Dr. John Lubahn, a surgeon specializing in hand injuries, who had treated Leonard since the day of the accident. His testimony would have been that the nature of Leonard's injuries was inconsistent with him having reached into the machine.

As to Frances, the trial court refused to permit him to testify on the erroneous ground that since he was within the court's subpoena range his deposition could not be used. The trial court adhered to this incorrect position even after it was pointed out that Frances resided more than one hundred miles from the courthouse. It can not be disputed that this holding ran flatly contrary to F.R.C.P. 32(a) which permits the use of any witness's deposition if the witness resides more than one hundred miles from the courthouse. *See Derewicki v. Pennsylvania Railroad Co.*, 352 F.2d 436, 441 (3d Cir. 1965); *Frederick v. Yellow Cab Co. of Philadelphia*, 200 F.2d 483 (3d Cir. 1952). The Third Circuit affirmed on the ground that since Frances's testimony would only have contradicted Anthony as to the time and place of the alleged statement, its exclusion from the record was harmless, thereby apparently adopting the view that testimony proving that a conversation could not possibly have happened at the time and in the manner testified to by another witness is irrelevant, regardless of the importance of the alleged statement.

As to Dr. Lubahn, the trial court ruled only that the testimony was not proper rebuttal. It did so despite the obvious and palpable fact that Dr. Lubahn's testimony was limited in its purpose to establishing that the accident did not happen in the manner contended by Massey. It was not offered to prove how the

accident happened, only to prove how it did not happen. The Third Circuit affirmed on the basis that since, according to its reading of the record, the jury was not told that contributory negligence was a defense this evidence was irrelevant. The fact that the jury was told Leonard Solties had been careless, while not being told that such carelessness was *not* a defense, was overlooked by the Court.

Rebuttal has been defined as "a term of art, relating to evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief." *Morgan v. Commercial Union Assurance Co.*, 606 F.2d 554, 555 (5th Cir. 1979). It is "evidence which dispels, explains, disapproves or contradicts evidence given by the adverse party." 5 *AM. Jur.*, Trials 527 (1966). The general rule is to exclude evidence in rebuttal not made necessary and relevant by the opponent's case in chief and to permit only such evidence that goes to counter new facts presented in the defense case in chief. *Allen v. Prince George's County*, 737 F.2d 1299, 1305 (4th Cir. 1984); *Zurich v. Wher*, 163 F.2d 791, 793 (3d Cir. 1947). Where there can be no surprise or prejudice to the opposing party, and the Third Circuit did not point to any, these rules may be departed from. *Zurich v. Wher*, *supra*; *Emerick v. U.S. Suzuki Motor Corp.*, 750 F.2d (3d Cir. 1984) (The true purpose of the evidence is controlling.) Merely because evidence *could* have been admitted in the plaintiff's case in chief does not automatically preclude its use as rebuttal. *Martin v. Weaver*, 666 F.2d 1013 (6th Cir. 1981), *cert. denied*, 446, U.S. 962 (1982); *National Surety Corp. v. Heinbokel*, 154 F.2d 266 (3d Cir. 1946). A plaintiff has no duty to rebut a defense yet to be heard. *Friend v. C.I.R.*, 102 F.2d 153 (7th Cir. 1939).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), it was held by this Court that a fundamental requisite of procedural due process is the opportunity to be heard. *Accord*, *Grannis v. Ordean*, 234 U.S. 385 (1914). In a trial context this opportunity to be heard must, by inescapable logic, include the opportunity to offer evidence and, if required under the circumstances in order to preserve the right to be heard, an abridgement of that opportunity may be violative of due process. *See Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983).

Equally fundamental to due process is the right and opportunity to be heard at a reasonable time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A hearing, without a meaningful opportunity to be heard, may be as fatal to due process as a total denial of a hearing, *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973), and without an opportunity to be heard, all other rights become illusory. *Martin v. Laver*, 686 F.2d 24 (D.C. Cir. 1982).

The trial court's erroneous exclusion of this rebuttal evidence effectively precluded plaintiffs from presenting their case by tying their hands at the moment they should have been afforded an opportunity to challenge Massey's defenses. Without Frances Solties's testimony there was no way to rebut Anthony's testimony. Without Dr. Lubahn's testimony, Massey's contention of how the accident happened was permitted to stand unchallenged by irrefutable physical evidence. In both instances the evidence was pure rebuttal. And in both instances, its exclusion rose to the level of a due process violation by erroneously depriving plaintiffs of an opportunity to present evidence crucial to their case.

Respectfully submitted,

BLANK, ROME, COMISKY & McCAULEY

By:_____

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CERTIFICATE OF SERVICE

I, hereby certify that three true and correct copies of the foregoing were served by first-class mail upon the following counsel of record:

CHESTER S. FOSSEE, ESQUIRE
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Pittsburgh, Pa. 15219

_____

Richard M. Rosenbleeth

DATED: February 13, 1987 and March 5, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

October 23, 1986

TO: C. Gary Wynkoop, Esquire
Herbert J. Johnson, Jr., Esquire
C.S. Fossee, Esquire*

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 86-3092 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except:

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3092

LEONARD SOLTIES and CECILIA SOLTIES, his wife,
Appellants

vs.

MASSEY-FERGUSON, INC.
and
INTERNATIONAL HARVESTER, CO.

Appeal from the United States District Court
for the Western District of Pennsylvania — Erie
(D.C. Civil No. 84-229 E)

Argued
September 29, 1986
Before: ALDISERT, *Chief Judge* and WEIS and MANSMANN,
Circuit Judges.
October 23, 1986

Richard M. Rosenbleeth, Esq.
C. Gary Wynkoop, Esq. (ARGUED)
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OPINION OF THE COURT
(Filed , 1986)

ALDISERT, *Chief Judge*.

This is an appeal from a products liability action, tried on the issue of liability only, in which the jury found for the defendant manufacturer of a corn picker. The appeal presents questions whether a new trial should be ordered because of error in jury instructions, and rulings of the trial judge refusing the admission of demonstrative evidence, denying rebuttal testimony, and denying a continuance of trial. We find no error and will affirm.

I.

Leonard Solties received serious injuries when he attempted to release a jam in an operating corn picker manufactured by the defendant Massey-Ferguson, Inc. In a diversity case under Pennsylvania law, Solties and his wife, Cecilia, brought a products liability action against the manufacturer, contending that there were two defects in the equipment that caused the injuries: that there should have been "stripper plates" over the cob-snapping rolls of the corn picker to act as a guard; and that there should have been a cable-activated emergency shutoff that could be activated by a person who got caught in the rollers. Appellants have summarized their contentions: "Plaintiffs' theories of liability were that the corn picker was defectively designed because of Massey's *complete failure* to guard *in any way* the in-running nip point created by the snapping rolls and its *total failure* to provide *any* means for an operator trapped in those rolls to turn the machine off." Appellants' brief at 22.

Solties is a farmer. After his corn picker became inoperable, he purchased the Massey corn picker (manufactured 30 years prior thereto) from a neighboring farmer. While Solties was operating the corn picker, it jammed. Yet, while the equipment was still operating, Solties attempted to clear the jam with his hand. His hand came into contact with the picker's snapping rolls and was pulled into the rear of the picker's head. As a result of the downward pull of a corn stalk through the rolls, or an effort

to get his balance or brace himself, his right leg entered the front portion of the picker's head, so that the lower leg was caught by the picker's gathering chains. He sustained serious injuries. The case was tried before Judge Willson and a jury on the issue of liability only. The jury found for Massey-Ferguson.

Appellants' brief presents five issues for our consideration: whether the trial court erred when it refused to instruct the jury that the defendant could be found liable if its defective product was *a* substantial factor in causing Leonard Solties' injuries, and instead instructed the jury that the defect had to be *the* cause of the injuries; whether the trial court erred by instructing the jury that Solties was guilty of contributory negligence; whether the trial court abused its discretion when it refused to permit plaintiffs' expert witness to utilize a hand drawing to illustrate his testimony; whether the trial court abused its discretion when it refused to permit plaintiffs to present a rebuttal; and whether the trial court abused its discretion when it refused to grant an unopposed request for a brief continuance that was based on an alleged personal condition of one of plaintiffs' trial counsel.

II.

Appellants contend that the jury instruction was improper. Although we note at the outset that appellants' objection to the instruction was inartful, we nevertheless will give them the benefit of the doubt and notice their contention. Appellants rely on section 431 of the Restatement (Second) of Torts, which provides:

> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Restatement (Second) of Torts §431(a)-(b).

Under Pennsylvania law, strict liability under section 402(a) requires the plaintiff to prove that the product was "in a defective condition" and that the defect caused the injury. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). Appellants contend that it was error for the district court not to have charged the jury on the "substantial factor" component of causation. The court's failure to do so, however, cannot be said to have substantially prejudiced appellants' case.

Preliminarily, we observe that the substantial factor component of causation is intended to reduce the attenuation between cause and effect. *See* Restatement (Second) of Torts §431 comment a; *see also id.* §433 & comments thereto. Therefore, the recitation of the component in a jury charge would narrow the field of possible legal causes, not broaden it. Accordingly, appellants' argument, that the inclusion of that component would have allowed the jury to consider *more* possible causes of Solties' accident, is misplaced.

From our study of the court's entire charge, it appears that the jury was properly instructed on the law of causation. In speaking to the generic definition of "cause," the court stated:

> The cause of it, the cause of my hurting my fist is if I bang it against that side of this desk maybe. See, *a* cause, *a* cause. Now, if there's a defect there, that doesn't cause it, then that's the problem in your case is of course, what caused this thing, what caused this thing?

App. at 339 (emphasis supplied).

When explaining causation as it related to the issues in the case at bar, the court instructed:

> What caused — Whether that any defect, if [it] was one or two of those defects, *did they play any part in [the accident]* or whether he walked around and fell down in spite of everything, and did he get hurt on account of falling into the machine, and he left a free machine running.

App. at 340-41 (emphasis supplied).

It can be seen from the court's instruction that, contrary to appellants' contentions, the court did not require too close a relationship between cause and effect, not did it exclude the possibility of multiple causes. Indeed, one could forge a strong argument that this instruction required less a connection between defect and accident than does the Restatement.

Finally, we note that, far from prejudicing appellants, the trial court at one point gave appellants what was tantamount to a directed verdict should a defect be found, by instructing the jury:

> If you find that lack of a cut off switch or guards over the snapping rolls made this corn picker defective, that it's unsafe for its use, Massey-Ferguson caused the harm.

App. at 343. This instruction omits the requirement of causation altogether. Appellants cannot at this point claim that the court instructed the jury on too stringent a formulation of causation.

III.

Appellants next argue that the court erred in charging the jury on contributory negligence. Appellants' brief at 24-26; *see* text at App. 340-41, *reprinted in* appellants' brief at 24. They contend that, under Pennsylvania law, contributory negligence is not a defense to a products liability action. Appellants' brief at 25. Our examination of the record, however, indicates that plaintiff did not object to the charge as required under Rule 51. Failure to object to an instruction precludes one from assigning any alleged error in that instruction as a basis for a new trial on appeal. Moreover, even if the point was properly preserved, we are not persuaded that the court's language amounted to a charge on contributory negligence.

IV.

The trial judge refused to permit an expert to make a hand-drawing to augment his testimony and other exhibits. Photographs of the corn picker were freely used by counsel for both parties and also were made available to the jury. Under these

circumstances, the failure to permit a hand drawing of the snapping rolls was not an abuse of discretion.

V.

At the conclusion of Massey-Ferguson's case-in-chief, appellants attempted to offer as rebuttal testimony the deposition of Solties' brother Francis and a videotape deposition of Dr. John Lubahn. The court denied the offer. Here, too, we find no abuse of discretion. Francis' deposition testimony allegedly was sought to be introduced to contradict testimony given by Solties' other brother, Anthony. Francis' testimony would not have gone to the substance of Anthony's testimony, but would only have contradicted it insofar as it related to the time at which Leonard told Anthony about the accident. Moreover, the testimony sought to be contradicted related to assumption of risk, a defense on which the jury was not instructed. Accordingly, even if the proffered deposition testimony was proper for rebuttal, appellants' substantial rights were not affected by its exclusion.

The purpose of Dr. Lubahn's testimony was to counter the defense theory that Leonard Solties did not injure his hand as the result of any defect, but because he tried to disengage corn from the jammed picker with his hand, while the motor was still running. In light of the fact that the jury was never instructed on contributory negligence or assumption of risk, however, appellants could not have been prejudiced by the absence of Dr. Lubahn's testimony. Moreover, a case can be made that the testimony of Dr. Lubahn should have been introduced in the plaintiffs' case-in-chief and was not proper rebuttal.

VI.

Finally, appellants request a new trial on the basis that the court improperly denied a continuance requested on behalf of one of appellants' counsel, Mr. Rosenbleeth. Upon being told that Mr. Rosenbleeth had a serious illness in his family, the trial judge stated, "[W]e can't postpone a case on that statement." App. at 107. The only further explanation for the requested continuance was forthcoming from Mr. Johnson, another of

appellants' counsel: "They explained to me it's a serious problem with [Rosenbleeth's] wife and for the next 30 to 45 days that may tell the answer on it, and he's very upset." *Id*. No explanation appears in the record describing what the "serious problem" involved, nor was there any explanation why counsel could not appear to try the case for the relatively short period required. At trial, appellants were represented by co-counsel Haft, who was fully involved with all stages of the case. The trial court already had extended the time for discovery once and had reopened discovery once. Futhermore, the court made it clear as early as November 4, 1986 that trial would commence on January 14, 1986. We find no abuse of discretion.

VII.

We have carefully considered all the contentions of the appellants.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Chief Judge

Leonard Solties and Cecilia Solties, his wife, v.
Massey-Ferguson, Inc.

No. 86-3092

MANSMANN, *Circuit Judge*, dissenting.

Among the allegations of error the plaintiffs bring before us are two issues regarding the trial judge's charge to the jury which I believe are so basic and fundamental that reversal is warranted. These issues involve the trial judge's repeated emphasis of the words "the cause" without accurately explaining legal causation and his descriptions of the husband-plaintiff's activity with the cornpicker which might have led the jury to infer erroneously that contributory negligence was a defense in a §402A case. I part company with the majority because my reading of the charge as a whole leads me to conclude that the charge did not fairly and adequately submit the issues to the jury and was so confusing and misleading that the verdict should not stand. *See United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984).

I.

For even lawyers sophisticated in §402A litigation, causation often poses semantical problems. Indeed, where an injured party's damages are based on allegations of the manufacturer's failure to provide guards or safety devices to protect against a user's inadvertent actions or mishaps, as frankly is often the case, the lawyers present differing proposed points for charge on the question of causation.

While Pennsylvania law is now settled that, as the majority opinion states, "the product was 'in a defective condition' and that the defect caused the injury", citing *Berkebile*, (Typescript p.5), it is also accepted Pennsylvania law that causation be clearly defined for the jury — legal cause as opposed to causation in fact. *See Whitner v. Lojeski*, 437 Pa. 448 (1970). It is precisely because multiple *factual* causes may bring about the injury that causation *correctly defined* is crucial to a jury's correct understanding of the legal issues.

The applicable standard for determining legal or proximate cause under Pennsylvania law is whether the alleged wrongful

acts were a substantial factor in bringing about the plaintiffs' harm. *E. J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F. Supp. 883 (E.D. Pa.), *aff'd*, 779 F.2d 42 (3d Cir. 1985). Indeed, the Pennsylvania Suggested Standard Civil Jury Instructions recommend the use of this standard as follows:

> If you find that the product was defective, the defendant is liable for all harm caused by such defective condition. A defective condition is the legal cause of harm if it was a substantial factor in bringing such harm about. Pa. SSJI (Civ) §8.04 (June 1984).

This is precisely the point for charge proposed by the plaintiff and the one summarily dismissed by the trial judge. Indeed, at oral argument before our court, counsel for the defendant-manufacturer admitted that the substantial factor charge is one regularly and routinely given by Pennsylvania trial judges in §402A cases.

Instead, the trial judge chose to define causation by relying on Webster's Seventh Collegiate and the American Collegiate Dictionaries. As he explained in his charge,

> Now, cause is not a word that takes the Supreme Court Justice of the United States or me or anybody else to worry about what it means. It's cause. It's used in the sense but I had my secretary look up a couple of them this morning. It's in a couple of dictionaries . . .

(App. at 338-339.) The jury was led to believe that the lay, non-legal or "dictionary definition" was correct.[1]

---

1. The Pennsylvania Suggested Standard Civil Jury Instructions define legal cause as follows:

3.25 (Civ) LEGAL CAUSE

In order for the plaintiff to recover in this case, the defendant's (negligent) (reckless) (intentional) conduct must have been a substantial factor in bringing about the accident. This is what the law recognizes as legal cause. A substantial factor is an actual, real factor, although the result may be unusual or unexpected, but it is not an imaginary or fanciful factor or a factor having no connection or only an insignificant connection with the accident. Pa SSJI (Civ) §3.25 (June 1984).

Rather than explaining clearly that more than one "cause" may co-exist and the manufacturer still be found liable, the trial judge chose to dismiss cause as if it were an all-or-nothing, exclusive concept. The trial judge repeatedly stated "the cause" instead of "a cause" and chose to disregard plaintiffs' counsel's exception properly called to his attention at the close of the charge.

While I believe the charge is fatally flawed by the failure to give the standard "substantial factor" instruction, I also believe that the numerous instructions given regarding "the cause" override the correct but isolated §402A instruction. Some examples are as follows:

> . . . the protection which is required is attained by the necessity of proving that there was a defect in the manufacture or design of the product and that such defect was the legal cause of the injuries. Defect is the cause. (App. at 338)
>
> The cause of it, the cause of my hurting my fist is if I bang it against that side of this desk maybe. See, a cause, a cause. Now if there's a defect there, that doesn't cause it, then that's the problem in your case is of course, what caused this thing, what caused this thing? (App. at 339)
>
> . . . If he did it, if he didn't do it, was it the cause by these failures to put on these devices that they — that counsel says should have been on there? Was that the legal cause? . . . (App. at 341-42)
>
> . . . If you find, however, that Massey-Ferguson manufactured or sold a defective product, which was the cause in bringing about the Solties harm, then Massey is liable for all of the harm caused by the defect. . . . (App. at 343)
>
> See, what's the cause? If the defect is the cause, if it is in fact, it might have been in other injuries, some greater or lesser and so on, whether he could forsee it or whether they couldn't. (App. at 344)

The omission of an explanation or definition of substantial factor may have led the jury to believe that an "either/or" situation existed. As well, the charge could have been construed to require the jury to impose liability on defendant Massey-Ferguson only if there was no cause of injury other than the defect(s) alleged. This charge was therefore in error and warrants reversal.

II.

During trial great emphasis was placed on the farmer's activities in attempting to repair the machine. This information, coupled with the confusion over legal and factual causes, made it incumbent upon the trial judge to explain and to dispel any thoughts about contributory negligence which the jury would have had. As we said in *Holloway v. J. B. Systems Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979), "The Pennsylvania Supreme Court, in *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978), condemned the use of instructions that might lead a jury, in a §402A action, to believe that the reasonableness of the defendant's conduct was an issue in the case."

Far from dispelling such notions, however, the trial judge's comments were directed to the issue of contributory negligence in such a way as to be prejudicial to plaintiffs' case. The following portion of the jury charge illustrates the nature of the judge's error:

> What caused -— whether that any defect, if it was one or two of those defects, did they play any part in it or whether he walked around and fell down in spite of everything, and did he get hurt on account of falling into the machine, and he left a free machine running.
>
> There's a mechanic, he's run garages, he's made his living at it for years, and he walked away twice. he didn't — He turned it off, he knew it was a danger to walk around there and play with that machine while it was running.

(App. p. 340-341)

I would find that the combination of the judge's remarks about the plaintiff "playing with the machine" and walking around and falling down "in spite of everything" coupled with the incorrect definition of causation could easily impel a jury to be improperly prejudiced by the farmer's activity.

The charge, in addition to being prejudicial to the plaintiffs, was inadequate in describing the law which governs the farmer's activity and the defect in question. Pennsylvania law is clear that contributory negligence has no relevance in a products liability action. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). The charge does not adequately delineate the circumstances under which the risk of loss should be placed on the manufacturer. When the charge is read as a whole, I find that there is an impermissible implication of contributory negligence as a defense. As such, I cannot say that the error was harmless. *See Bailey v. Atlas Powder Company*, 602 F.2d 585 (3d Cir. 1979).

The majority relies upon its finding that plaintiffs' counsel failed to object, under Rule 51, to the judge's factual recitation. To the contrary, I believe a clear, if abbreviated, objection was made at sidebar and would find that the issue is properly subject to our review (App. at 349). The objection made, coupled with prior discussion between counsel and the court in reviewing the proposed points for charge, makes it evident that the trial judge knew what counsel meant. It is the trial judge's comprehension and understanding that are important in situations such as these, not only the literal meaning of the words.

III.

Because I believe the trial judge's charge on either the issue of causation or the issue of contributory negligence merits reversal, I do not find it necessary to reach appellants' other issues. For the reasons stated, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3092

LEONARD SOLTIES and CECELIA SOLTIES, his wife,
Appellants

vs.

MASSEY-FERGUSON, INC.
and
INTERNATIONAL HARVESTER, CO.

(W.D. Pa. Civ. No. 84-229 E)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, and SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Chief Judge

Dated: November 19, 1986